IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of A.S., a person under eighteen years of age. _____ R.R., Appellant, v. State of Utah, Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070398-CA F I L E D (March 6, 2008) 2008 UT App 71

Third District Juvenile, Salt Lake Department, 514355
The Honorable Andrew A. Valdez

Attorneys: Jayson F. Henderson, Bountiful, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Greenwood, Thorne, and McHugh.

GREENWOOD, Presiding Judge:

R.R. (Father) appeals the termination of his parental rights in his biological daughter A.S., arguing that he received ineffective assistance of counsel. We affirm.

Father alleges that his counsel was ineffective because he failed to: (1) seek recusal of the trial judge, (2) make several objections, (3) present evidence linking secondhand smoke exposure to positive drug tests, and (4) subpoena Pastor White to testify. An ineffective assistance claim raised for the first time on appeal and without a prior evidentiary hearing presents a question of law. See State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998). To establish a claim of ineffective assistance of counsel, a party must show both that his counsel's actions were objectively deficient and that he was actually prejudiced thereby. See Menzies v. Galetka, 2006 UT 81, ¶ 87, 150 P.3d 480; see also State v. Diaz, 2002 UT App 288, ¶ 38, 55 P.3d 1131

(noting that failure to satisfy either prong will negate a claim of ineffective assistance of counsel). When evaluating a claim of ineffective assistance, appellate courts will presume--and any ambiguities in the record will be construed in favor of a finding--that counsel's actions were part of a sound trial strategy. See State v. Litherland, 2000 UT 76, ¶¶ 17, 19, 12 P.3d 92. This strong presumption is only overcome if, disregarding the clarity of hindsight, the appellate court determines that "no conceivable legitimate tactic or strategy can be surmised from counsel's actions." State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993). In addition, "[n]either speculative claims nor counsel's failure to make futile objections establishes ineffective assistance of counsel." State v. Chacon, 962 P.2d 48, 51 (Utah 1998).

Father first argues that his counsel should have sought recusal of Judge Valdez pursuant to Utah Rule of Civil Procedure 63(b) because "Judge Valdez presided in a recent criminal case involving [Father]," causing him to be biased against Father. See Utah R. Civ. P. 63(b). It appears from the record that Father overstates his case. In fact, Judge Valdez merely filled in for another judge at Father's initial appearance, "during which [Father] was given a copy of the information, waived its reading, and was appointed counsel." Furthermore, Father testified at length regarding each of his numerous criminal incidents, including the incident over which Judge Valdez temporarily presided. Finally, Father presents no evidence, and there is none in the record, that indicates Judge Valdez was biased or prejudiced against Father. Thus, Father has failed to demonstrate that his counsel was ineffective in failing to seek recusal of Judge Valdez.

Father next claims that his counsel was ineffective in failing to object to the judicial notice and admission into evidence of "Docket Statements and Informations" detailing Father's criminal history. Father argues that admission of these documents into evidence was needlessly cumulative and unfairly prejudicial. If requested by a party and provided with the necessary validation, "a court shall take judicial notice," Utah R. Evid. 201(d) (emphasis added), of any document that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," id. R. 201(b)(2).

The State asked the trial court to take judicial notice of its exhibits concerning Father's criminal history. Receiving no objections, the court took judicial notice of these exhibits--which the court interpreted to be "legal documents . . . generated through court proceedings in [Judge Valdez's] court as well as other courts"--with the express reservation that Father's

counsel be given "a chance to rebut or explain the[m]." Father does not contend that the documents did not qualify for judicial notice or that the trial court could have rejected judicial notice if an objection had been made. Furthermore, Father was not prejudiced by judicial notice of his criminal records as he himself testified regarding his entire criminal history.[1] Therefore, counsel's failure to object does not constitute deficient performance.

Father further alleges that his counsel was deficient in failing to object to Ms. Reyes's testimony that Father was not "honest" with her, despite Ms. Reyes's lack of personal knowledge of Father's trustworthiness. However, Ms. Reyes did not testify regarding Father's general trustworthiness; rather, she only testified that Father denied to her that he was using drugs and then tested positive for illegal drugs. Counsel's failure to make a futile objection to this testimony does not equate to ineffective assistance.

Father also argues that his counsel was ineffective because he introduced no medical studies showing the possibility for an individual to test positive for drug use solely from exposure to secondhand smoke.[2] However, Father's counsel did indeed request the court to take judicial notice of such studies during direct examination of Father. Although the court ultimately declined to do so, the court did allow Father to testify that he believes he tested positive for drugs due to "passive inhalation." Thus, Father's counsel attempted to present such studies but the court ruled against him. Failing to successfully submit such studies--assuming their existence--does not, in this case, amount to ineffective assistance.

Finally, Father argues that his counsel was ineffective for failing to subpoena Pastor White as a witness on Father's behalf. This claim is close to being frivolous as the record clearly shows that Father's counsel took meaningful steps to produce Pastor White as a witness. In fact, the court ordered Pastor White to appear on the third and final day of the proceedings "so that [Father's counsel] would not have to subpoena him." In addition, the judge himself, at the request of Father's counsel,

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1. Father does not fault his counsel for allowing Father to testify regarding his criminal history, and thus, we conclude that he suffered no prejudice from the admission of this same criminal history in a written--as opposed to oral--format.

2. Despite Father's persistent assertion that such studies are readily available, there are none in the record and Father has failed to refer to even one such study on appeal.

called Pastor White and left messages for him at three different phone numbers during that same proceeding. Pastor White's decisions to disobey a court order and not answer his phone do not equate to counsel's ineffectiveness. Furthermore, Father presents no argument that Pastor White's testimony would have made any difference in the outcome. Thus, this claim has no merit.

In conclusion, Father has failed to meet his substantial burden of proving that his counsel's actions or lack thereof were objectively deficient or, assuming that they were, that he was actually prejudiced thereby. We therefore affirm the trial court's order permanently terminating Father's parental rights in A.S.

Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Carolyn B. McHugh, Judge